

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

IN RE SEARCH OF 22 BLACKWATCH TRAIL
APARTMENT NO. 8, FAIRPORT, NEW YORK,

06-MR-6009T

**DECISION
and ORDER**

INTRODUCTION

By motion dated June 21, 2006, petitioner Mark Leitner, ("Leitner") proceeding pro se, moves pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure for the return of property seized during the execution of a search warrant at 22 Blackwatch Trail, Apartment No. 8, in Fairport, New York. Leitner resides at that address, and seeks the return of several items including financial documents and records, compact discs, video games, and computer discs, that were allegedly taken pursuant to the May 10, 2006 search of his home. According to Leitner, the search warrant upon which the executing agents relied was invalid, and not supported by probable cause. He therefore asserts that the search and seizure of his property was unlawful. Leitner further objects that the executing agents exceeded the scope of the warrant by taking items that were not set forth in the search warrant. The government objects to Leitner's motion, and contends that the property removed from 22 Blackwatch Trail Apt. 8 was lawfully seized pursuant to a valid search warrant.

BACKGROUND

Petitioner Mark Leitner resides at 22 Blackwatch Trail in Fairport, New York. According to a May 9, 2006 Affidavit in support of an Application for a search warrant submitted by Jarod Koopman ("Koopman"), a special agent with the Internal Revenue Service ("IRS"), Leitner is a full-time consultant working for an organization known as Pinnacle Quest International ("PQI"). According to IRS Agent Koopman, PQI and its consultants engage in several unlawful practices including tax evasion and tax fraud. According to information contained in the affidavit, PQI consultants sell memberships into the organization at a cost ranging from \$1,350.00 to \$18,750.00. As benefits of membership, members allegedly receive information related to wealth creation and management, retirement planning, and methods for reducing or eliminating taxable income. Members may also purchase additional information including "The Reliance Defense Package" which purports to demonstrate that the Sixteenth Amendment to the United States Constitution was never ratified, and therefore, cannot serve as a lawful basis for the imposition of federal taxes.¹

In approximately June, 2003, the IRS instigated an undercover investigation of PQI and several of its consultants including

¹ The Sixteenth Amendment to the United States Constitution was ratified on February 3, 1913, and provides that: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Leitner. Based on information gathered during the investigation, IRS agents learned that several PQI consultants failed to report or pay income tax for income earned through work for PQI. According to Koopman's Affidavit, Leitner earns between \$50,000 and \$100,000 as a consultant for PQI, but has not paid taxes since 1998. Based on the information gathered during the investigation, IRS agents sought a warrant to search Leitner's apartment for evidence of criminal activity including failure to pay taxes, failure to file income tax returns, and conspiracy to commit tax offenses and tax fraud. According to the Government, Leitner is currently under investigation by the IRS, though no criminal charges have been filed against him.

On May 9, 2006, United States Magistrate Judge Jonathan W. Feldman issued a search warrant authorizing a search of the petitioner's residence. The warrant authorized, inter alia, the search for and seizure of financial records related to PQI and or Leitner, client lists, correspondence between Leitner and the IRS, correspondence between Leitner and any other individual regarding PQI. On May 10, 2006, IRS agents executed the search warrant at 22 Blackwatch Trail, and thereafter provided the petitioner with an inventory of items taken pursuant to the warrant.

On May 11, 2006, one day after the execution of the search warrant, petitioner appeared at IRS offices in Rochester, New York to demand the return of his property on grounds that the warrant was

invalid. According to Leitner, the IRS refused to return his property. By undated letter received by the IRS on May 24, 2006, Leitner made a formal written request for the return of all property that was seized on May 10, 2006, on grounds that the search of his residence was unlawful. Although Leitner contends that the IRS refused to return any of his property, the Government contends that some of Leitner's property was returned to him following his requests. The Government asserts that all remaining property in its possession is property that was lawfully taken pursuant to the search warrant. On June 24, 2006, petitioner filed the instant motion for return of his property.

DISCUSSION

Petitioner moves pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure for Return of all property that was taken pursuant to the May 10, 2006 search of his home. Rule 41(g) provides that:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). Although Rule 41(g) provides that the court "must receive evidence on any factual issue necessary to decide the motion", evidentiary hearings are not required where the issue for determination is a legal issue, and not a factual issue. See e.g.,

Matter of 949 Erie Street, Racine, Wisc., 645 F.Supp. 55, 57-58 (E.D. Wisc., 1986) (evidentiary hearings not granted as a "matter of course"-petitioner must allege detailed facts that are non-conjectural, material and disputed that, if proved, would entitle petitioner to relief.) (citing U.S. v. Migley, 596 F.2d 511 (1st Circ. 1979)).

In the instant case, petitioner raises two claims in support of his motion for the return of his property. First, Leitner contends that the warrant was facially invalid because the warrant failed to allege that a crime was committed, failed to state the items sought were the fruit, evidence, or implements of crime, and failed to be based on the oath or affidavit of a official with knowledge of the alleged criminal activity. See Petitioner's Memorandum of Law at p. 6. Second, petitioner contends that the agents executing the search exceeded the scope of the warrant by seizing items that were not identified in the warrant. See Petitioner's Memorandum of Law at p. 11.

With respect to Leitner's claim that the warrant was unsupported by an oath or affirmation, I reject that claim, as the record reveals that the warrant application contained an affidavit submitted by Special Agent Jarod Koopman of the Internal Revenue Service setting forth the basis for the agency's belief that petitioner had engaged in various crimes including tax evasion. The affidavit sufficiently sets forth facts upon which a reviewing judicial officer could determine that probable cause existed to believe that evidence of

criminal activity could be found at the petitioner's residence. Plaintiff's claim that the warrant was invalid because the supporting affidavit was not served upon him with the warrant is without merit, as there is no requirement under law that such an affidavit be served with a search warrant.

With respect to petitioner's claim that the warrant failed to identify an alleged crime, or that the items to be seized constituted evidence, implements, or fruit of crime, I reject that contention as well. As recently stated by the Supreme Court in United States v. Grubbs, ____ U.S. ____, 126 S.Ct. 1494, 1500 (2006) "The Fourth Amendment . . . does not set forth some general 'particularity requirement.' It specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized.' We have previously rejected efforts to expand the scope of this provision to embrace unenumerated matters." In the instant case, the warrant issued by Magistrate Judge Feldman specifically identified the location to be searched, and the items to be seized. As such, the warrant issued by Judge Feldman was lawful.

Finally, Leitner contends that the agents executing the search exceeded the scope of the warrant by taking items that were not subject to seizure under the terms of the warrant. Specifically, the petitioner contends that CD's, video games on CD or DVD, a Lion's Club contact list, credit cards, money orders, receipts, a passport, and unspecified other records were unlawfully seized in connection

with the search warrant. I find, however, that the petitioner has failed to raise a claim with respect to these items. Items such as money orders, and receipts were the direct subject of the warrant, and accordingly, seizure of those items under the warrant was authorized. Similarly, the seizure of CD's and DVD's, and contact lists was authorized in connection with the search for records related to PQI. Any CD's and DVD's not related to any subject of the warrant have been or will be returned to the petitioner, and Leitner has not identified any specific CDs or DVDs that have been unlawfully retained. See August 21, 2006 Affidavit of Jarod Koopman. Similarly, the Government has affirmed that petitioner's credit cards and passport will be returned to the petitioner, and I Order that those items be returned forthwith. Because the items seized were within or arguably within the scope of the search warrant, and because upon examination those items that are not within the scope of the warrant have been or will immediately be returned to the petitioner, I find that the agents executing the warrant did not exceed the scope of their authority.

CONCLUSION

For the reasons set forth above, I deny petitioner's motion for return of property consistent with this Order.

ALL OF THE ABOVE IS SO ORDERED.

S/ Michael A. Telesca

Michael A. Telesca
United States District Judge

DATED: Rochester, New York
August 22, 2006